

[As approved at Committee meeting on April 22, 2022]

VERMONT SUPREME COURT
SPECIAL ADVISORY COMMITTEE ON
RULES FOR ELECTRONIC FILING

MINUTES OF MEETING, January 21, 2022

The Committee meeting was convened (via video conference) at approximately 1:32 p.m. Present/participating were Judge Kate Hayes (serving as Chair in the absence of Chair Justice John Dooley), Judges Tom Durkin and David Fenster; Scott Griffith, Tari Scott, Teri Corsones, Su Steckel, Chasity Stoots-Fonberg, Eric Avildsen, Marcia Schels and Scott Woodward. Committee Reporter Walt Morris, and Emily Wetherell were also present. Judge Beth Mann and Liaison Justice Bill Cohen were absent.

1. Approval of the May 14, July 9, and December 17, 2021 meeting minutes.

On motion of Teri Corsones, seconded by Su Steckel, the minutes of the referenced meetings were unanimously approved.

2. Report(s): Reporter Morris and Ms. Wetherell provided brief updates as to status of various rules amendments of interest to the Committee:

--**LCJR Committee meeting** on October 21, 2021; The LCJR reviewed a number of amendments, including (1) the package of V.R.A.P./V.R.E.F. amendments related to efilings/case management in the Supreme Court that had already been promulgated; (2) proposed V.R.C.P. 5(a) amendments making permanent the A.O. 49 provisions for filing and serving certain documents by *email*; (3) amendment of V.R.C.P. 6(e) to abrogate the “three day” rule in time computation; and (4) V.R.P.A.C.R. Rules 5, 6 and 9 amendments as to specific rights of access; exceptions to public access for certain ex parte and in camera matters, and trade secrets, confidential business information, and Rule 9 sealing. There were no objections articulated to these.

--There were a number of **Promulgated Rules** Amendments noted:

- The “V.R.A.P./V.R.E.F. efilings Rules Package”-was promulgated 7/13; eff. 7/15 (V.R.E.F.) and 8/17 (V.R.A.P.).
- **V.R.E.F. 5(d)** (providing public access to certain civil complaint filings prior to clerk review—“Courthouse News” injunction); following the 12/17/21 Committee meeting, was promulgated on 12/20/21; effective immediately.
- **V.R.C.P. 11(e)** (Covid-related amendment was added to provide “declaration” in place of notarization) Promulgated on 12/13/21; and effective 2/14/23. David Fenster, Tari Scott, and Emily Wetherell all had comments as to the background of this issue, the conclusion being that the best “remedy” would be legislative action to clarify when notarization is not required for a declaration, excepting in cases where notarization is otherwise required by statute.

-- And as to other proposed rules amendments under consideration, Reporter Morris indicated that proposed revisions of A.O. 9 (Professional Responsibility Program) associated with adoption of Odyssey efilings/case management in Lawyer Discipline and Disability Proceedings had

been placed on hold, pending further consideration by the Professional Responsibility Board. A joint subcommittee had begun review of the provisions of A.O. 9 as to adjudication procedures for disputed cases, but in consideration of concerns as to lawful confidentiality and access to records of Board procedures, it was deemed advisable to permit the Board to engage in some further discussion of adoption of specific provisions of the V.R.E.F. Review of amendments of A.O. 9 would proceed upon further report from the PRB.

ACTION ITEMS; Proposed Rule Amendments for Committee Review/Comment

Reporter Morris and Emily Wetherell provided an overview of each of the following proposed amendments, all (excepting the proposed amendment of V.R.E.F. 11(c)), being indirectly related to OFS and the V.R.E.F. Except as noted, there were no Committee comments or objections presented as to any of the following proposed rules:

- **V.R.E.F. 11(c)** (Service of discovery via OFS unless alternative is agreed to; this amendment, previously considered and approved by the Committee at its December 17, 2021 meeting, would conform V.R.E.F. 11(c) to proposed amendment of V.R.C.P. 5(b)(2)(D)). The comment period is to close on 2/14/22. There were no additional comments or concerns stated by Committee members; another Committee review opportunity will precede any promulgation recommendation.¹
- **V.R.A.P. 25** (would now reference V.R.C.P. 5 and the V.R.E.F. as to Supreme Court filing requirements—related to pending V.R.C.P. 5 amendments) Comment period to close on 2/14/22.
- **V.R.C.P. 5, 6(a)(4), 29 and 79.1** (Comprehensive amendment of rules regarding service, including OFS and alternative modes of service. Makes permanent A.O. 49 provision for certain service by *email*.) The comment period is to close on 2/14/22. Ms. Wetherell described the reformatting of Rule 5, and its various provisions relating to categories (“methods”) of service and filing. In discussion, it was noted that non efilers (principally self-representers) have been able to file via email per A.O. 49 for approximately two years now. The main issue has been with maintenance of current email addresses by email filers, for purposes of receipt of responsive notices. Marcia Schels and Emily Wetherell indicated that there is ongoing work with Trial Court Operations to fine tune the process of email filing. Judge Hayes suggested that the email filing issues should not actually implicate the V.R.E.F. at all. Ms. Wetherell pointed out that this package of amendments would also provide that efilers must use OFS to serve discovery documents unless an alternative method is agreed upon (See, the V.R.E.F. 11(c) amendment, *infra*.); equivalent amendments conform the requirements of V.R.A.P. 29 to those of the amended Rule 5; and Rule 79.1 is amended to clarify requirements of self-represented parties, including a notice of

¹ The text of the proposed V.R.C.P. 5(b)(2)(D) explicitly addresses and refers to service of discovery documents by efilers via the electronic filing system unless the parties agree to an alternative method of service. The amendment also prescribes the process of service of discovery documents by non-efilers: “(D) Service of Discovery Documents. (i) An efiler must serve discovery requests or responses on an efiler using the service function of the electronic filing system unless the parties agree on an alternative method of service. (ii) Service by or on non-efilers may be made by mailing, by delivery, or by email or other method if the parties agree.”

appearance that specifies contact information and permits a self-representer to consent to receipt of service via email. Finally, the package amends Civil Rule 6(a)(4) in conjunction with amended Rule 5(e)(5)(B) to specify that the “last day” for filing by email ends at midnight on the day in issue, as has been the case for efilings per OFS. Beyond Ms. Wetherell’s report, there were no comments or objections presented by Committee members.

- **V.R.C.P. 6(e); V.R.A.P. 26(c) & 26(d)(1), 31(a); V.R.Cr.P. 45(e)** (These amendments would serve to abrogate the “three day” rule in computation of certain filing times; other V.R.A.P. amendments; email filing up to midnight - V.R.Cr.P. 45(a)(4)(A)) The comment period closed on 11/15/21, except for the V.R.Cr.P. amendment, to close there on 2/14/22. As explained, the rationale for the amendment is that with full implementation of OFS filing, the three day “grace period” is no longer deemed necessary.
- **V.R.P.A.C.R. 5(c) and (d); 6(b)(20-22) and Abrogating and Replacing V.R.P.A.C.R. 9** (These amendments clarify specific rights of atty/GAL access to records that are not otherwise restricted; add exemptions for records of ex parte matters, trade secrets or other info that is sealed; abrogate and replace V.R.P.A.C.R. 9 re: sealing, or provision of access to sealed, court records). The comment period for these amendments closed on 11/15/21; there appear to be no V.R.E.F. implications presented, and again, there were no comments or objections on the part of Committee members.

3. **V.R.E.F. 12 and 3(b)—Exemption from efilings** for wills and related documents in Probate Division and other original “paper” documents for which non-electronic filing may be mandated by specific provision of statute.² This item has been on the Committee’s agenda for almost a year, and has been considered at a number of meetings, and rough “concept” drafts have been exchanged with the Probate Rules Committee. The Committee determined to appoint a subcommittee to work with members from Probate Rules and Oversight Committees to provide a consensus draft of rules amendments for consideration. V.R.E.F. representatives include Tari Scott, Chas Stoots-Fonberg, and Reporter Morris. For Probate, Judges Kilgore and Glover are serving.

The subcommittee’s original meeting date had to be postponed; however, the subcommittee will meet before the next scheduled Committee meeting to provide a discussion draft of proposed rules amendments for consideration at that time.

4. **V.R.E.F./CIVIL RULES “Integration” Project**; Coordination of V.R.E.F. with other Procedural Rules: Status of Work of Civil Rules Subcommittee (Keyes; Badgewick; Spero) to Review Suggested Revisions of V.R.C.P. and V.R.E.F. to Better Conform Electronic Filing and Civil Rules in Context of Particular Needs of Practice in that Unit. A Civil Rules subcommittee has engaged in substantial work, on a model of incorporation of a number of V.R.E.F. rules into the body of the Civil rules, that would in effect, “house” these pertinent portions of the V.R.E.F. there. Reporter Morris indicated that Justice Dooley and he had met with Ms. Wetherell on December 14th and, in consultation with Civil Rules Chair Allan Keyes, had determined that further work on this

² See, e.g., 14 V.S.A. § 2 (Wills deposited for safe keeping in the Probate Division); also original documents that must be filed upon commencement of certain probate proceedings per V.R.P.P. 3.

rules integration project should await a period of further experience with the functioning of OFS, and any issues observed with electronic filing in each of the Divisions.

5. V.R.E.F. 3(b)(1)—Ongoing issues with exemption from efilings for certain documents filed by governmental agencies in certain proceedings, notwithstanding requirement of the rule.³

Since adoption of the 2020 V.R.E.F., there have been ongoing issues as to providing exemption from efilings for certain agencies, for certain filings routinely made. The question has often come down to whether amendment of Rule 3 to specify additional exemption categories is necessary, or whether the issue can be addressed through CAO directive and business process guidance? Most recently, **OCS has requested exemption from efilings of address updates for clients.** An OCS memorandum describing the request, and basis for it, was provided in advance of the meeting to Committee members. Tari Scott indicated that given the caseload, there are a substantial number of address updates that must be provided to the Court, and Magistrates rely on this information in proceedings in parentage, and child support determinations. Ms. Scott stated that a rule amendment was not necessarily expected, but guidance and suggestions of the V.R.E.F. Committee. For further context, she indicated that Trial Court Operations and OCS were in close communication about a number of issues, as they are a very frequent filer, and efforts have been collaborative as OFS practice evolves, such as in the provision of draft orders for Magistrate review and approval, and a pilot project under which OCS is taking on responsibility for service of initial case filings, notices and orders. There was considerable discussion of the general and specific issues. Ultimately, while the Committee consensus was to recognize the importance of the issue, an administrative remedy, rather than rule amendment, was to be preferred. Marci Schels indicated that she would communicate with the IT person at OCS to examine whether an administrative/technological solution can be implemented for provision of this important data effectively to the court.

8. V.R.E.F. 8; Filing of Exhibits; Consideration of Draft Amendments to Clarify Uniform Statewide Procedures for Efilings of Proposed Exhibits; Treatment of Admitted Exhibits; and procedures for Video/Audio Exhibits.

Report/Update on status of efforts of Standard Practices Committee by members who are also members of the V.R.E.F. Committee. Ms. Wetherell indicated that the Standard Practices Committee had been meeting, and would again meet in the next week. Judge Fenster stated that that Committee was focusing on a number of items, many not relevant to the work of the V.R.E.F. Committee. As to OFS filing and treatment of exhibits in the electronic case record, there is complexity, with variation among the divisions/dockets. A significant issue goes to treatment of exhibits that are filed under pretrial scheduling orders, and entered into the court record, yet never offered, or withdrawn from offer. Of course, an admitted exhibit is unquestionably part of the record, but there are significant issues as to treatment of exhibits that are pre-filed, under a court order or unit protocol, and whether they remain a part of the record simply because they are pre-filed as a potential convenience to parties and the court. Judge Fenster also indicated that there was an issue presented under the Public Access rules as to when certain exhibits are considered accessible.⁴ The Standard Practices Committee has determined that treatment of media exhibits must be addressed as well. Beyond the

³ As examples, Tax Department providing tax clearance documents in probate cases; DAIL reports of wards' status; Lund Home reports in adoption proceedings; OCS filings as a party vs. draft child support orders for convenience of the court; DMV filings; and NGO Court-related filings, such as from Restorative Justice and Diversion programs.

⁴ See, PACR 6(c) and accompanying Reporters Notes, 2021 Cum.Supp. pp. 254-55.

report and discussion, there was no Committee action taken as to exhibits, and whether any amendment of V.R.E.F. 8 was warranted.

9. V.R.E.F. 11(f); (Failure of) Notice to Attorneys of Issuance of Court Orders in Odyssey; Judge (In)Ability to Confirm Issuance of Orders in the Case File.⁵

Su Steckel indicated that she had received a lot of feedback from other attorneys about ongoing glitches between Odyssey and E-Cabinet and have personally experienced problems as well. Frequently, attorneys are not being notified when orders are issued, yet this is apparently not evident to judges looking at the Odyssey file/electronic case record. Sometimes the lack of notice is the result of human error and sometimes the cause is not apparent, but this seems to be happening more frequently. She cited her own experience when she received a certificate of redemption, and never received a copy of the judgment upon which it was based. Another on-going issue goes to delay between a filing and acceptance of that filing by the court staff, and its impact on calculation of responsive times.

As to the second issue (delay in acceptance of a filing), Ms. Wetherell indicated that responsive times are calculated from date of service, and service does not occur in OFS until the filing is accepted. Error may result in service if the efiler does not elect to “File and Serve”, but this was an earlier experience with OFS, and is not as common now. As to receipt of service of court orders, Ms. Stoots-Fonberg indicated that she had received about five examples of cases where attorneys had not received notice from the court. Some attorneys have “firewalls” that result in rejection of the emailings. Su Steckel replied that she manages her own office “tech”, and in her case, there would have been no firewall issue preventing receipt of the court order. Scott Woodward indicated that this issue was one that the Court Users Group was aware of and had been looking to identify the “glitches”. Ms. Stoots-Fonberg indicated that attorneys should be encouraged to notify Court Operations of issues that they are experiencing with failure to receive service of court orders, so that sources of problems and remedies can best be explored.

On the issue of delay in acceptance of efilings, Teri Corsones shared her view that while the process of Centralized Review of efilings had initially resulted in some delays in acceptance, any rules amendment might not be necessary if processing times have improved. Laurie Canty stated that available data establishes that processing times on Centralized Review have definitely improved.

Summing up the discussion, Judge Fenster stated that there appear to be three issues: (1) Perceived delays from time of efilings to time of acceptance of the filings, and thus, to time of service of the filing; (2) Lawyers making filings that are never served; and (3) Court issuance of orders that do not get served. In his assessment, it would be premature to go to any rules amendment as the remedy, before having further information and data as to the causes and frequency of these issues. Scott Woodward and Su Steckel agreed. The consensus was to defer further consideration to the next Committee meeting, in hopes that further data could be made available as to both timing of filing to time of acceptance in Centralized Review, and the failure to accomplish service issues. Ms. Stoots-Fonberg and Ms. Schels both indicated that they and others have been involved in tracking and examining remedies for the reports of these issues. Ms. Stoots-Fonberg stated that a remedy may be in the form of user education, and providing additional clarification as to OFS service procedure, either in website notices, or user manuals, or if the matter calls for too technical a response,

⁵ V.R.E.F. 11(f) provides that “The court will transmit any notice, order or other document issued by the court to electronic filers by electronic means.”

reference to the Help Desk. Ms. Schels indicated that so far, they have not seen anything that would prevent parties from receiving service, but that of course doesn't mean that responsive efforts should not continue. Discussion of this Agenda item will resume at next Committee meeting.

10. Receipt date for *emailed* filings vs. efilings via OFS (Tari Scott inquiry, 10/25/21). Committee consensus was that in view of proposed amendments to V.R.C.P. 6(e)(5)(B) and V.R.Cr.P. 45(a)(4)(A) that would clarify that *emailed* filings are timely if sent before midnight on the date required for responsive pleading, as has been the case with efilings, the issue will be resolved.

11. Centralized Review/Rejection of Criminal eFilings and Affidavits Containing Information Deemed not Publicly Accessible (Name of child not a victim); **Need for Clarity of an Appeal Process in event of Rejection** (Request of Judge Zonay, 12/20/21)

The issue presented is whether and what review process should be available when an efiler wishes to appeal rejection of a filing on Centralized Review. At present, there is no established procedure, and in the case in issue, the Chief Superior Judge was called upon to respond to the attorney complaint. Judge Fenster stated that the case originated from his assigned court, and that in his view, it was very important that there be some established means provided for appeal of rejection of an efilings, however infrequently that might occur. There is a difference between rejection for technical noncompliance with a portion of the V.R.E.F. rules, and rejection for perceived noncompliance with the Rules for Public Access, which can involve serious questions as to preservation of confidentiality of information that is not publicly accessible. At this juncture, in the interests of time, the Committee decided to continue discussion of this agenda item at its next meeting.⁶

Adjournment.

On motion of Teri Corsones, seconded by Tari Scott, the meeting was adjourned at approximately 3:39 p.m. The next regular meeting of the Committee will be scheduled by the Reporter following results of an availability poll of Committee members.

Respectfully submitted,

Walter M. Morris, Jr.
Superior Court Judge (Ret.)
Committee Reporter

⁶ V.R.E.F. 5(d) prescribes the process for court staff review and acceptance or rejection of an efilings. Review is "for compliance with these rules (the V.R.E.F.) and Rule 7(a)(1) of the Rules for Public Access. V.R.E.F. 5(d) continues, prescribing the efiler's ability to submit a corrected filing within 7 days, with relation back of the filing to date of original attempt. Additional provisions permit extension of the 7 days for good cause, and direct court staff to accept a corrected filing if all requirements of the rules and the instructions for correction have been met. Yet there is no provision for appeal from rejection, apart from the ability to correct (without prejudice as to the timing as indicated).

PACR Rule 7(a) does provide for additional court staff responsibilities and authority upon review for compliance of an efilings with the Public Access Rules. *PACR 7(a)(4)* provides for staff reference of an efilings that does not comply with *PACR* to "an assigned judge, who after notice and hearing may" impose certain sanctions for noncompliance. But the focus of this provision is upon sanctions for noncompliance with the rules, and not to resolve dispute as to the basis for rejection of an efilings.